Sures a/l Perumal v Public Prosecutor

HIGH COURT (TAIPING) — CIVIL APPEAL NO 41–39 OF 2000
VT SINGHAM JC
15 JANUARY 2001

Criminal Procedure *— Revision — Revisionary power of High Court — Plea of guilty — Appellant convicted for breach of supervision order — Appeal against sentence — Charge against accused did not disclose an offence in law — Irregularities in conviction brought to attention of judge on appeal — Whether fit and proper case for judge to exercise revisionary powers*

The appellant pleaded guilty to a charge under s 6(3) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 ('the Act') for breaching a supervision order dated 14 January 2000 issued by the magistrate's court under s 6(1)(b) of the Act. The appellant was sentenced to 24 months imprisonment. The appellant appealed against the sentence. At the outset of the appeal, counsel for the appellant urged the court to exercise its reversionary powers as the conviction was unlawful on the ground that the conviction against the appellant was on a charge which did not disclose an offence under the law and the drug, namely cannabinoid, was not a dangerous drug under the first schedule of the Dangerous Drugs Act 1952. The deputy public prosecutor conceded that the conviction could not be sustained. The issue before the court was whether the court should revise the order made by the magistrate's court as the appeal was only against the sentence.

Held, allowing the appeal:

(1) Although the appellant's appeal was on sentence only, the court sitting as an appellate court was obliged to look into the record of appeal and exercise its power of revision if the record shows that a failure of justice had occasioned by any irregularity in the proceedings. In the present case, the appellant had pleaded guilty to a charge which does not constitute an offence in law. The court found that the charge against the appellant did not disclose an offence under the Act as charged and that conviction could not stand in law (see pp 113I–114A).

(2) The charge alleged that the appellant took drug and not dangerous drug during the period when he had been ordered to undergo supervision by a rehabilitation officer. In order to label the appellant or any person as a drug dependant, he must have taken to use dangerous drug and not just any drug. The findings of the chemist on the test carried out on the specimen urine of the appellant disclosed that the specimen urine contained cannabinoid which was not a dangerous drug or substance comprised in the first schedule of the Dangerous Drugs Act 1952 (see pp 115I–116A–B, D).

(3) There was no medical or chemist evidence that cannabinoid is derived from cannabis or any other dangerous drugs and the magistrate or this court even if it has knowledge as to the source from which cannabinoid is derived, it cannot import personal knowledge as a substitute or supplement for medical or chemist evidence (see p 116E–F).

(4) No order for a retrial was made because the prosecution will not in any event be able to file an amended charge. Based on the facts and circumstances in this case, the prosecution will not be able to correct the situation based on the evidence and the documents submitted to the magistrate's court as there had been an incurable flaw in the investigation carried out by the investigation agency (see p 117D–E).

[**Bahasa Malaysia summary**

Perayu mengaku bersalah terhadap satu dakwaan di bawah s 6(3) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut') kerana melanggar satu perintah penyeliaan bertarikh 14 Januari 2000 yang dikeluarkan oleh mahkamah majistret di bawah s 6(1)(b) Akta tersebut. Perayu dihukum penjara 24 bulan. Perayu tersebut merayu menentang hukuman tersebut. Pada permulaan rayuan tersebut, peguam perayu mendesak mahkamah menggunakan kuasa semakannya kerana sabitan tersebut salah di sisi undang-undang atas alasan bahawa sabitan terhadap perayu adalah berasaskan satu sabitan yang tidak mendedahkan kesalahan di bawah undang-undang dan dadah tersebut, iaitu cannabinoid, bukannya satu dadah merbahaya di bawah jadual pertama Akta Dadah Merbahaya 1952. Timbalan Pendakwa Raya mengaku bahawa sabitan tersebut tidak boleh dipertahankan. Isu di hadapan mahkamah adalah sama ada mahkamah patut menyemak perintah yang dibuat oleh mahkamah majistret kerana rayuan tersebut hanyalah terhadap hukuman tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Walaupun rayuan perayu cuma terhadap hukuman, mahkamah yang berperanan mahkamah rayuan mempunyai tanggungjawab menyemak rekod rayuan dan menggunakan kuasa semakannya sekiranya rekod menunjukkan bahawa berlakunya ketidakadilan disebabkan salah aturan prosiding. Dalam kes semasa, perayu mengaku bersalah atas satu tuduhan yang tidak merupakan satu kesalahan di sisi undang-undang. Mahkamah mendapati bahawa tuduhan terhadap perayu tidak mendedahkan satu kesalahan di bawah Akta tersebut seperti yang didakwa dan bahawa sabitan tersebut tidak boleh dipertahankan di bawah undang-undang (lihat ms 113I–114A).

(2) Tuduhan tersebut mendakwa bahawa perayu menggunakan dadah dan bukannya dadah merbahaya sewaktu beliau diarahkan

menjalani penyeliaan oleh seorang Pegawai Pemulihan. Untuk melabelkan perayu atau sesiapa sahaja sebagai seorang penagih dadah, beliau mestilah telah menggunakan dadah merbahaya dan bukan sebarang dadah sahaja. Keputusan ahli kimia atas ujian yang dijalankan ke atas contoh air kencing perayu mendedahkan bahawa contoh air kencing tersebut mengandungi cannabinoid yang bukannya satu dadah merbahaya atau bahan yang terkandung di dalam jadual pertama Akta Dadah Merbahaya 1952 (lihat ms 115I–116A–B, D).

(3) Tiada keterangan perubatan atau kimia bahawa cannabinoid dihasilkan dari kanabis atau apa-apa dadah merbahaya yang lain dan majistret ataupun mahkamah, walaupun tahu akan usul cannabinoid, tidak boleh memindah pengetahuan peribadi sebagai ganti atau tambahan kepada keterangan perubatan atau kimia (lihat ms 116E–F).

(4) Tiada perintah perbicaraan semula dibuat kerana pihak pendakwaan tidak mampu memfailkan tuduhan yang dipinda dalam apa jua keadaan. Berdasarkan fakta dan keadaan kes ini, pendakwaan tidak mampu membetulkan situasi berdasarkan keterangan dan dokumen-dokumen yang dikemukakan di mahkamah majistret kerana terdapatnya kesilapan yang tidak dapat dibetulkan dalam penyiasatan yang dilaksanakan oleh agensi penyiasatan tersebut (lihat ms 117D–E).

Notes

For cases on revision generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2374–2421.

Cases referred to

Habeeb Najar a/l Abdul Rashid lwn Penguasa Komandan, Pusat Serenti Bukit Mertajam High Court, Pulau Pinang Criminal Application No 44–12–49 (unreported) (refd)
Heng Kim Khoon v PP [1972] 1 MLJ 30 (refd)
Kerry v Carter [1969] 1 WLR 1372 (refd)
Manokaran & Anor v PP [1979] 1 MLJ 262 (refd)
Mee Lian Co v PP [1962] MLJ 131 (refd)
Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 1 MLJ 645 (refd)
PP v Anthony [1972] 1 MLJ 229 (refd)
PP v Lee Ee Teong [1953] MLJ 244 (refd)
PP v LKI Holidays Leisure Sdn Bhd [1998] 1 MLJ 315 (refd)
PP v Paghutheen [1969] 1 MLJ 25 (refd)
PP v Low Ah Sang [1962] 28 MLJ 13 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Subramaniam & Anor v PP [1976] 1 MLJ 76 (refd)
Tang Kee Chie v PP [1987] 1 MLJ 430 (refd)
Wong Siak Fon v PP [1972] 1 MLJ 203 (refd)

Legislation referred to

Criminal Procedure Code s 305

Drugs Dependants (Treatment and Rehabilitation) Act 1983 ss 2, 6(1)(b), (3)

Sundarajan s/o Sokalingam (*Sundarajan & Assoc.*) for the appellant.

Abdul Hakim Amir bin Ahmad Nordin (Attorney General's Chambers) for the respondent.

VT Singham JC: **.** This is an appeal by the appellant against the sentence passed on him by the Magistrate's Court, Sungai Siput on 25 October 2000 for an offence punishable under s 6(3) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The learned magistrate sentenced the appellant to 24 months imprisonment for breach of a supervision order ('the said order') dated 14 January 2000 given by the Magistrate's Court, Kuala Kangsar to undergo supervision by a Rehabilitation Officer for a period of two years for a drug related offence under the Act. One of the conditions of the said order dated 14 January 2000 was that the appellant cannot take, consume, or possess any dangerous drugs.

The charge reads as follows:

> Bahawa kamu pada 6 March 2000 jam lebih kurang 9.15 pagi di Balai Polis Sungai Siput (U) dalam Daerah Sungai Siput Utara di dalam Negeri Perak Darul Ridzuan sebagai seorang yang diletakkan di bawah 'Pengawasan Dadah' di bawah perenggan 6(1)(b) telah melakukan satu kesalahan yang boleh dihukum di bawah s 6(3) Akta Penagih Dadah (Rawatan dan Pemulihan) No 283/83 pindaan 1998.

The supervision order dated 14 January 2000 issued by the Magistrate's Court, Kuala Kangsar was under s 6(1)(b) of the Act wherein it states that the appellant was confirmed to be a drug dependant by a government medical officer and the magistrate after having giving the appellant an opportunity to make representation and upon the recommendation of the rehabilitation officer, ordered the appellant to undergo supervision by the rehabilitation officer for a period of two years with effect from 14 January 2000.

Section 6(1) of the said Act reads as follows:

> 6 Magistrate's order which may be made on a drug dependant.
>
> (1) Where a person who has undergone the tests referred to in ss 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving 'such person an opportunity to make representations —
>
> (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

On 17 March 2000 at about 9.15am, while the said order dated 14 January 2000 was still in force, the appellant was arrested and specimen urine was taken from him by Detective Sergeant Abdullah bin Kader of the Anti Dadah branch, Balai Polis, Sungai Siput and the urine specimen was sent to the Ipoh General Hospital to the laboratory for test and analysis for drugs. The result of the analysis and test carried out by En Sabab bin Hashim, a chemist of Jabatan Patologi Hospital Ipoh was disclosed in his report dated 25 March 2000 which confirmed that the urine contained cannabinoid. The appellant was also confirmed to be a drug dependant and the dangerous drug was confirmed to be cannabinoid by Dr Kevin L Joseph of Hospital Sungai Siput in his report dated 18 August 2000 as a result of the necessary test carried out by him on the appellant.

As a result of the specimen urine taken from the appellant on 17 March 2000, based on the chemist report dated 25 March 2000, the police report lodged by Detective Sergeant Abdullah bin Kader on 4 April 2000 and the medical report dated 18 August 2000, the appellant was charged on 25 October 2000 at the Magistrate's Court, Sungai Siput for breach of the said order dated 14 January 2000 issued by the Magistrate's Court, Kuala Kangsar. The charge against the appellant was for an offence under s 6(3) of the Act which provision reads as follows:

> Any person undergoing supervision under paragraph s 6(1)(b) who fails to comply with any condition imposed under the section shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

The appellant who was unrepresented at the Magistrate's Court, Sungai Siput pleaded guilty to the charge and he was sentenced to 24 months imprisonment from the date of his remand on 18 August 2000. The appellant being dissatisfied with the sentence, filed his appeal through the Prison Department to the High Court, Taiping against the sentence. At the appeal, the appellant was represented by counsel Mr S Sundarajan and the respondent was represented by En Abdul Hakim Amir bin Ahmad Nordin, the deputy public prosecutor.

Appeal

At the outset of the appeal, the learned counsel for the appellant urged this court to exercise its reversionary powers as the conviction was unlawful on the ground that the conviction against the appellant was on a charge which does not disclose an offence under the law and the drug, namely, cannabinoid was not a dangerous drug under the first schedule of the Dangerous Drugs Act 1952. However, this court before proceeding to exercise its powers of revision, invited both the learned counsel for the appellant and the learned deputy public prosecutor to address this court as to whether this court should in fact revise the order made by the learned magistrate of the Magistrate's Court as the appeal was only against the sentence. It is important to state at this stage that since the appellant had pleaded guilty to the charge there is no right of appeal against the conviction

as provided under s 305 of the Criminal Procedure Code ('the CPC'). As expected, when the learned counsel for the appellant started to address the court, the learned deputy public prosecutor with his usual frankness stood up and said that in order to save judicial time, he would concede that the conviction cannot be sustained.

In this particular case, the learned magistrate, with respect, seemed not to have considered or read carefully the charge and the facts presented by the prosecution and seems to have gone on a mechanical exercise of his powers which is not an appropriate judicial exercise and is left much to be desired.

Drafting of charges

In *Mee Lian Co v PP* [1962] MLJ 131, his Lordship Adams J said:

> I must yet again draw the attention of prosecuting officers to the necessity of drafting correct charges against the correct person and also of proving to the satisfaction of the court all the ingredients of the charge. Finally, it is the duty of the court to see that the charge is properly drawn at the time it is read and explained to the defendant. This clearly could not have been done in this case.

In *PP v Low Ah Sang* [1962] MLJ 13 at p 15, his Lordship Hashim J, said:

> I shall now deal with the charge and the order of the learned President. In my opinion the charge was very badly drafted. In this respect I would commend all presidents of sessions courts and magistrates to read and digest the observations of the learned Chief Justice. In his oral judgment in *PP v Syed Bakri* (Ipoh Criminal Revision No 3 of 1955, unreported) his Lordship said: 'I have repeatedly emphasized that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and the magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case, 'as it has come to light in this appeal.'

In *Subramaniam & Anor v PP* [1976] 1 MLJ 76 at p 78, his Lordship Ajaib Singh J had this to say:

> The framing of the charges in this case and the subsequent conduct of the proceedings in court left much to be desired. The administration of criminal law is not to be treated light-heartedly but is to be carried out seriously with a sense of dedication and with great care and attention.

In *Manokaran & Anor v PP* [1979] 1 MLJ 262 at p 263, his Lordship Abdoolcader J (as his Lordship then was) said:

> It is a matter of the gravest public policy that the impartiality of the courts of justice should not be doubted, or that the fairness of a trial should be questioned; otherwise, the only bulwark of the liberty of the subject would be undermined.

In *Heng Kim Khoon v PP* [1972] 1 MLJ 30 at p 31, his Lordship Sharma J said:

> In taking down a plea of guilty the use of the set formula:
> 'Charge read over and explained to the accused and understood by him. Pleads guilty. Understands the nature and consequences of his plea. Plea accepted.'
>
> should not be the result of sheer wont and habit as if it was an empty and meaningless ritual which the pen irresistibly begins to perform and complete once the magic words 'I plead guilty' are uttered by the accused. The taking down of a plea of guilty is a solemn and serious act and the magistrates should devote some time and active thought before they decide to accept that plea and base a conviction thereon.

A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act. If he pleads guilty under an erroneous view of the law, his conviction cannot stand. In such a case the plea of guilty does not avail because he cannot be said to have committed the offence in question in the eyes of the law.

In *Heng Kim Khoon v PP* [1972] 1 MLJ 30 at p 31, his Lordship Sharma J referred to his Lordship's own decision in Malacca Criminal Revision No 4 of 1970 wherein his Lordship said:

> I like to add that when an accused person pleads guilty it is the duty of the learned magistrate to carefully consider whether the accused fully understands the nature of the charge to which he pleads guilty. A plea of guilty, as has been said, must be received with caution and generally the court should satisfy itself by putting questions to the accused in order to see whether he is aware of the facts on which the charge is founded against him and also whether he admits his guilt voluntarily without any extraneous pressure or expectation of a lesser sentence. An accused does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged in the charge which in law are said to disclose an offence under the section named in the charge. ... It is the duty of the appellate court to see that the accused had not pleaded guilty on a misconception of law or that his conviction was not founded on such evidence which did not or could not constitute the offence under the charge.

Revisional powers

In *PP v Anthony* [1972] 1 MLJ 229 at p 230, his Lordship Sharma J in exercising his Lordship's powers of revision in a case where the accused was convicted on his plea of guilty which his Lordship set aside and quashed the conviction said:

> I regret the liberty of a subject has by the lack of ordinary and requisite care expected of the courts in every case been imperilled and unnecessarily interfered with. I may also take this opportunity to say that the prosecution itself should exercise a lot more care and vigilance in framing a charge against an accused. The object of a charge is to give notice to the accused of the essential facts constituting the offence which he is alleged to have committed and the law he has violated. The charge should be capable of being substantiated with as much evidence as is available to the prosecution. It is not enough merely to say that some offence has been committed by the accused.

He is required to answer a specific charge and meet the specific allegations in the charge and pointedly plead thereto alone.

I am, however, thankful to the learned deputy for having at this stage very candidly conceded that the charge against the accused was wrong in law and unsustainable. But for the manly and scrupulous honesty with which the learned deputy has acknowledged the folly of the charge and the futility of the prosecution case it would have been impossible for me to know the facts relied upon by the prosecution. I commend the spirit in which the information has been given to the court. Fairness should characterize every prosecution. The magistrates (and judges as well), like all human beings, at times are apt to fall into error and take the wrong sow by ear. Injustice is thus prone to result in those cases where the court slips into such error. It however adds to the stature, lustre and dignity of man if once that mistake is discovered, detected or brought to his notice he does not hesitate to own it. The learned magistrate deserves credit for having brought this matter to the High Court and the learned deputy equally great credit for having stated the correct position so that the mistake already made could be rectified and the accused restored to his freedom.

In *PP v LKI Holidays Leisure Sdn Bhd* [1998] 1 MLJ 315 at 320, in dismissing the appeal on behalf of the public prosecutor, his Lordship Mohd Hishamudin J said:

This observation has been bothering me for quite some time and I think I should take the opportunity here to comment that prosecuting officers should not take the task of drafting charges lightly. The attitude that drafting charges is a mere mechanical task ought to be discarded. Prosecuting officers should take the task seriously. They should be meticulous and at the same time ensure that the provision of ss 152, 153 and 154 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') are strictly adhered to. They should, from time to time, seek the advice of the public prosecutor, especially when it concerns the drafting of less common offences (for instance, like the one in the present case). Magistrates too are under a duty to ensure at the commencement of any criminal case before them that the charge has been properly drafted. Should it come to the notice of the presiding magistrate that the charge is defective, he should promptly bring it to the attention of the prosecuting officer, and thereafter take the necessary measures to rectify the defect. Let me remind magistrates and prosecuting officers of the advice of Thomson J (who later became our first Lord President) given more than 40 years ago. In his oral judgment in *PP v Syed Bakri* (Ipoh Criminal Revision No 3 of 1955, unreported), his Lordship said:

> 'I have repeatedly emphasized that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and that magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case.'

This court is of the view that although the appellant's appeal is on sentence only, this court sitting as an appellate court is obliged to look into the record of appeal and exercise its power of revision if the record shows that a failure of justice had occasioned by any irregularity in the proceedings. In this case,

the appellant had pleaded guilty to a charge which does not constitute an offence in law. Bearing in mind that this court is bound by the language of the law and to give effect to it when language is crystal clear, this court is of the view that there must be judicial intervention by an appellate court in cases where the appeal record so glaringly shows that there has been a miscarriage of justice on the legality of the conviction which is being challenged and conceded on behalf of the public prosecutor. This court is of the view that it is the function of this court sitting as an appellate jurisdiction to put right the record which has gone wrong in the subordinate courts as it happened in this case. His Lordship, the late Lord Denning MR in *Kerry v Carter* [1969] 1 WLR 1372 at p 1376 said:

> If we think that the judge below was wrong, then we ought to say so,...

In *PP v Paghutheen* [1969] 1 MLJ 25 at p 26, his Lordship Ong Hock Sim J said:

> ... where an accused person has been convicted by the magistrate on his own plea of guilty and is precluded from appealing against the legality of the sentence under s 305 of the States Code, the appellate court can always in a proper case exercise its powers of revision, I decided to revise this case. I find in the circumstances, justice is best done if I quash the conviction on these charges and order the fines to be refunded.

In *Wong Siak Fon v PP* [1972] 1 MLJ 203 at p 205, his Lordship Lee Hun Hoe J (as his Lordship then was) said:

> In the present case although the appellant has no right of appeal against his conviction the appellate court is entitled to look into the record and, if there is any irregularity which occasions a failure of justice, the court will exercise its powers of revision.

In *Tang Kee Chie v PP* [1987] 1 MLJ 430 at p 431, his Lordship Chong Siew Fai J (as his Lordship then was) in setting aside the conviction and sentence of an accused on his own plea of guilty referred to *Heng Kim Khoon v PP* [1972] 1 MLJ 30 and *Subramaniam & Anor v PP* [1976] 1 MLJ 76 and said:

> If the facts disclosed in a case show the absence of an essential ingredient constituting the alleged offence such that no court would have convicted the accused, the conviction and sentence will be set aside. Even if there is no right of appeal, this court as the appellate court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice had occasioned.

However, this court is not unmindful of the case in *Re Radha Krishna Naidu* [1962] MLJ 130, wherein his Lordship Hepworth J said:

> It should only exercise revisional powers in exceptional cases when there has been a denial of the right of a fair trial or it is urgently demanded in the interests of public justice. In my opinion the legislature does not intend that a private party shall secure by an application in revision a right which is reserved for the Public Prosecutor only. (See *Mandal v Mandal*, *Rai v Doss* and Mallal's Criminal Procedure (3rd Ed, p 379).

A In my view this is not a case in which I ought to interfere and accordingly there will be no order on the revision.

On the other hand, in *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 at p 654, his Lordship Gopal Sri Ram JCA in delivering the majority judgment of the Court of
B Appeal said:

> A court hearing an appeal against sentence is entitled to and will, where appropriate, act in revision set aside a conviction.

However, his Lordship had a qualification to this proposition when his Lordship said that:

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> save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged.

Be that as it may, in the meantime, this court wish to take this opportunity to remind magistrates not to hurry justice but to carefully consider the facts
D and the charge presented by the prosecution especially when the prosecuting officer is not qualified in law and when the accused person is not represented by a lawyer so as to ensure that the charge and/or the facts presented by the prosecution discloses an offence in law before accepting the plea of guilt of an accused person because an accused person cannot be found guilty and convicted of a charge which does not disclose an offence
E in law. It has been said time and time again that 'justice hurried is justice denied' and magistrates must take time to consider the charge and the facts and read the law reports to keep abreast with the decision of the superior courts so that their decision will be in accordance with the law and settled principles of law. Unless this procedures are complied by the subordinate
F courts, it would deem necessary that this court will always be compelled to revert on its powers of revision on an appeal in a case where an accused person has pleaded guilty and convicted on a charge which does not disclose an offence in law. In *Habeeb Najar a/l Abdul Rashid lwn Penguasa Komandan, Pusat Serenti Bukit Mertajam* vide High Court, Pulau Pinang Criminal Application No 44–12–49 (unreported), his Lordship Mohd Nor
G Abdullah J said:

> Saya ingin mengambil kesempatan ini untuk memberi nasihat dan membuat teguran kepada setiap Majistret dan hakim Mahkamah Sesyen supaya sentiasa merujuk kepada undang-undang statute yang terkini atau kemaskini.

H This court is of the view that if an accused person pleads guilty to a charge under an erroneous view of the law, his conviction cannot stand and in such a case the plea of guilty cannot be sustained because he cannot be said to have committed the offence in question in the eyes of the law.

I *Decision of this court*

In allowing the appeal against both the conviction and sentence, although the appeal was in reference only against sentence, this court finds that the

charge against the appellant did not disclose an offence under the Act as charged and that the conviction cannot stand in law for the following reasons:

Firstly, the charge which was framed against the appellant did not disclose an offence under the Act because the charge alleges that the appellant took drug and not dangerous drug during the period when he has been ordered to undergo supervision by a rehabilitation officer. In order to label the appellant or any person as a drug dependant, he or she must have taken to use dangerous drug and not just any drug.

The term 'drug dependent' as defined in s 2 of the Act states that:

> a person who through the use of any dangerous drug undergoes a psychic and sometimes physical state which is characterized by behavioral and other responses including the compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effect and to avoid the discomfort of its absence.

Secondly, the findings of the chemist of the Ipoh General Hospital on the test carried out on the specimen urine of the appellant discloses that the specimen urine contained cannabinoid which is not a dangerous drug or substance comprised in the first schedule of the Dangerous Drugs Act 1952.

Thirdly, the facts presented by the prosecuting officer and read to the appellant exh P1 by the learned magistrate states that the findings of the chemist discloses that the urine specimen of the appellant contained cannabis which is incorrect and misleading because the Government chemist report exh P4 expressly states the drug found in the specimen urine of the appellant was cannabinoid. There was no medical or chemist evidence that cannabinoid is derived from cannabis or any other dangerous drugs and the learned magistrate or this court even if it has knowledge as to the source from which cannabinoid is derived, it cannot import personal knowledge as a substitute or supplement for medical or chemist evidence. In *PP v Lee Ee Teong* [1953] MLJ 244, his Lordship Thomson J (as his Lordship then was) said:

> It is not open to any judge or magistrate to import his personal knowledge on the point into a criminal trial so as to help out evidence for the prosecution which would otherwise be inadequate to support a conviction.

Fourthly, the facts presented by the police prosecuting officer states that the alleged offence was committed on 17 March 2000, whereas the date of the alleged offence contained in the charge states as 6 March 2000 which date is not even related to the date the urine specimen which was taken from the appellant on 17 March 2000 by Detective Sergeant Abdullah for a test to be carried out by the government biochemist.

As stated above and in view of the above mentioned flaws, this court sitting as an appellate court could always exercise its powers of revision notwithstanding the restriction in s 305 of the CPC because the conviction is illegal and therefore this is an appropriate case to revise the order of the learned magistrate.

Section 305 of the CPC reads as follows:

> When plea of guilty limited right of appeal
> When an accused person has pleaded guilty and been convicted by a Magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

It is settled principle that when an accused person pleads guilty to an offence not known to law or to a charge which does not disclose an offence in law, the plea of guilt ought not to be accepted by the magistrate. In *Sau Soo Kim v PP* [1975] 2 MLJ 134, his Lordship Lee Hun Hoe CJ (Borneo) said:

> ... if an accused pleaded guilty to a charge which creates no offence known to law and further the facts also disclose no offence, clearly such a conviction could not be allowed to stand. Surely, such a plea of guilty to what is not an offence is no plea at all.

Retrial

In the circumstances, the appeal is allowed, the conviction is quashed and the sentence is set aside and the appellant is acquitted and discharged. In this matter this court wishes to make it clear that no order for a retrial was made because the prosecution will not in any event be able to file an amended charge because the result of the analysis of the urine specimen taken from the appellant does not itself disclose an offence under the Act, namely, cannabinoid which as stated above is not a dangerous drug or substance comprised in the first schedule of the Dangerous Drugs Act 1952 and the prosecution, with respect, based on the facts and circumstances in this case will not be able to correct this situation based on the evidence and the documents submitted to the magistrate's court, as there has been an incurable flaw in the investigation carried out by the investigation agency.

Appeal allowed.

Reported by Jafisah Jaafar